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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-4463

CHET R. BENNETTS, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Chet R. Bennetts, appeals through counsel that part of an October 27, 2015, Board of Veterans' Appeals (Board) decision that (1) declined to reopen the appellant's claim for benefits based on service connection for a sleep disorder to include sleep apnea; (2) denied a disability rating in excess of 50% for the appellant's post-traumatic stress disorder (PTSD); and (3) granted a disability rating of 20%, but no higher, for a radiculopathy of the appellant's right lower extremity.<sup>1</sup> Record (R.) at 2-16. The appellant argues that the Board (1) failed to ensure the duty to assist was satisfied in declining to reopen the sleep disorder claim; (2) provided an inadequate statement of its reasons or bases for denying a higher rating for PTSD; and (3) relied upon an inadequate VA examination in declining a rating in excess of 20% for the radiculopathy to his right lower extremity. Appellant's Brief at 7-17. For the foregoing reasons, the Court will vacate that part of the Board's October 27, 2015, decision on appeal and remand those matters for readjudication.

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<sup>1</sup> The Board also remanded the appellant's claims for benefits based on service connection for a right knee disability. R. at 16-19. This matter is not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Marine Corps as an equipment operator from January 1999 to July 1999 and as a convoy security officer from June 2004 to April 2005, including service in Iraq. R. at 1591 (DD Form 214). The appellant has reported that while stationed in Iraq he witnessed "5 or more significant blast exposures" and "toxic gas inhalation related to a lithium battery fire." R. at 934.

In a July 2007 rating decision, the regional office (RO) granted the appellant benefits based on service connection for PTSD and awarded a 30% disability rating. R. at 1085-92. In December 2008 the appellant filed for benefits based on service connection for a sleep disorder and for "[l]ower back pain and problems." R. at 918.

In January 2009 the appellant underwent a VA PTSD examination, wherein the examiner found that his sleep disorder was a symptom of his PTSD and not a separately compensable condition. R. at 860. In a March 2009 rating decision the RO denied the appellant's sleep disorder claim on the grounds that the appellant did not have a "diagnosis of a sleep disorder associated with [PTSD]" and that any "[s]leep problems are considered a symptoms of your [PTSD] and are considered in that evaluation." R. at 831. The RO also granted the appellant service connection for lumbar spine disc disease with radiculopathy of the right lower extremity and awarded a 20% disability rating, as well as increased the appellant's disability rating for PTSD to 50%. R. at 826-28. The appellant did not appeal and the decision became final.

In May 2013 the appellant filed a request to reopen his "claim for disability compensation benefits for sleep apnea or sleeping disorders" and requested an increased rating for his back condition, citing back spasms, "[n]umbness and tingling [that] shoots down my right leg." R. at 611-12.

In October 2013 the appellant underwent a VA PTSD examination, wherein the examiner confirmed a diagnosis of PTSD and a cognitive disorder not otherwise specified resulting from post concussive syndrome and found that those conditions were inextricably intertwined. R. at 209. The examiner noted the appellant's symptoms of depressed mood and anxiety, as well as the appellant's reports that his memory affected his performance at work. R. at 212-13. The examiner also noted that the appellant suffers from "mild impairment" of memory, but also found that his "[d]elayed memory was severely impaired," which "may reflect the seriousness of the PTSD having the effects on the" cognitive disorder. R. at 207, 211. The examiner found that the appellant suffers from "[o]ccupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks." R. at 207. The examiner also found that the appellant "does not exhibit a diagnosis of sleep disorder secondary to PTSD," but does suffer from chronic sleep impairment. R. at 209, 212.

That same month, the appellant underwent a VA physical examination, complaining of daily lower back pain with "pain and burning and tingling down [the] right leg a few times a day." R. at 231. The examiner noted mild intermittent pain, numbness, and paresthesia in the appellant's right lower extremity, as well as decreased sensation in his right lower leg and ankle, secondary to disc disease of the spine. R. at 219, 231. The examiner found that the appellant suffered from moderate incomplete paralysis of the sciatic nerve. R. at 233. During an examination of the appellant's back, the examiner found that

[p]ain and weakness could significantly limit functional ability during flareups, or when the joint or spine is used repeatedly over a period of time. Additional limitation due to pain and weakness is feasible and likely to occur. However, it is not possible to determine actual degrees of additional range of motion loss due to pain on use or during flareups, as an examiner must be present to objectively and clearly determine those additional losses, if present.

R. at 222.

In a January 2014 rating decision the RO denied the appellant's request to reopen his sleep disorder claim, continued the 50% disability rating for the appellant's PTSD, and granted a 10% disability rating for the radiculopathy of his right lower extremity, effective May 17, 2013. R. at 184-205. The appellant appealed. R. at 79-88, 89-119, 154-63.

In October 2015 the Board (1) declined to reopen the appellant's claim for entitlement to benefits based on service connection for a sleep disorder to include sleep apnea; (2) denied a disability rating in excess of 50% for the appellant's PTSD; and (3) granted a disability rating of 20%, but no higher, for a radiculopathy to the appellant's right lower extremity. R. at 3-16. The Board found that the appellant had not submitted new and material evidence sufficient to reopen the appellant's sleep disorder claim, stating that the evidence received after the March 2009 rating decision was "new," but not material, as it did not "relate the Veteran's claimed sleep disorder either to a service-connected disability or to active duty service." R. at 6-7. In denying the appellant's claim for a higher rating for PTSD, the Board relied on the October 2013 examination and found that the appellant's symptoms "more closely approximated the schedular criteria required for the 50 [%] disability rating." R. at 11-13. Regarding the radiculopathy of the appellant's right lower extremity, the Board relied on the October 2013 examination and found that the incomplete paralysis of the sciatic nerve in the appellant's right lower extremity was of "moderate severity," warranting a 20% disability rating but no higher under Diagnostic Code (DC) 8520. R. at 14 citing 38 C.F.R. § 4.124a, DC 8520 (2016)). This appeal follows.

The Court determines that the Board provided an inadequate statement of its reasons or bases for finding that no new and material evidence had been received to reopen the appellant's claim for a sleep disorder. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated by statute that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). In a March 2009 rating decision, the RO denied the appellant's original claim for a sleep disorder on the grounds that there was no diagnosis of a sleep disorder related to PTSD and that any sleep problems are already compensated in his PTSD evaluation. R. at 831. The October 2012 examiner diagnosed the appellant with "chronic sleep impairment," not secondary to PTSD. R. at 209, 212. It is therefore unclear why this evidence

is not material to the finding in the March 2009 rating decision that there is no current sleep disability not already part of the appellant's PTSD symptomatology. The Board acknowledged the October 2013 examiner's finding of chronic sleep impairment, but found that it was not "material" evidence as it did not relate the condition "either to a service-connected disability or to active duty service." R. at 7.

The Board misapplied the law when it required that this evidence "raised a reasonable possibility of substantiating" a nexus between the sleep disorder and service, as opposed to another element of service connection such as the existence of a current disability. *See* 38 C.F.R. § 3.156(a); *see also Shade v. Shinseki*, 24 Vet.App. 110, 120 (2010) (rejecting the position that the phrase "raises a reasonable possibility of substantiating the claim" (38 C.F.R. § 3.156) requires that the appellant submit his own medical nexus evidence to reopen his claim, even though he has provided new and material evidence concerning any other missing element). Remand is required for the Board to address whether evidence that the appellant suffers from chronic sleep impairment that is unrelated to his PTSD is "new and material" evidence sufficient to reopen his sleep disorder claim.

The Court also determines that the Board provided an inadequate statement of its reasons or bases for not returning the October 2013 examination for clarification when it denied the appellant an increased rating for PTSD. *Gilbert, supra*; *see also* 38 C.F.R. § 4.2 (2016). The October 2013 examiner noted that the appellant suffers from mild memory loss, attributable to either his PTSD or his cognitive disorder, but also noted that his "[d]elayed memory was severely impaired," which "may reflect the seriousness of the PTSD having the effects on the" cognitive disorder. R. at 207, 211. Thus the examination leaves unclear the level of occupational and social impairment caused by this symptom of PTSD, a factor that is relevant to whether the appellant is entitled to a 70% rating, especially given the examiner's contradictory finding of severe impairment. *See* 38 C.F.R. § 4.130, DC 9411 (2016). Remand is required for the Board to provide an adequate statement of its reasons or bases for relying on this examination or to return the examination for clarification. 38 C.F.R. § 4.2.

Finally, the Court determines that the Board provided an inadequate statement of its reasons or bases for relying on the October 2013 examination in finding that the appellant's level of paralysis was "moderate" and thus did not warrant a disability rating in excess of 20%. *Gilbert, supra*. The

October 2013 examiner found that the level of paralysis in the appellant's right lower extremity was moderate, but that the appellant's low back pain disability with radiculopathy was subject to flareups that were not present on the day of the examination. R. at 222, 233. Although the examiner acknowledged that the appellant would likely suffer additional functional limitation with flareups, he failed to address whether a flareup in the lower back area, causing pain and weakness, would increase is radiculopathy symptoms. *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (when VA provides a medical examination, it must be adequate for rating purposes, which means it must be "based upon consideration of the veteran's prior medical history and examinations and also describe[] the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one" (citations and internal quotation marks omitted)). Remand is warranted for the Board to provide an adequate statement of its reasons or bases for relying on the October 2013 examination, or provide a new examination that addresses whether the level of paralysis in the appellant's right lower extremity would be different during flareups of weakness and pain in the spine.

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

For the foregoing reasons, that part of the Board's October 27, 2015, decision on appeal is VACATED and those matters are REMANDED for readjudication.

DATED: November 29, 2016

Copies to:

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